IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1186

CHARLES WHARTON,

Petitioner

vs.

SAM GARRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CHARLES WHARTON,
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v.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Your Petitioner, Charles Wharton, repectfully prays of the court that a write of certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Fourth Circuit docketed December 4, 1978 denying your petitioner relief and dismissing his appeal.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reproduced

in the appendix infra at page A 1.

The Order denying the Petition for rehearing is reproduced in the Appendix infra at page A7 .

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 4, 1978. The Petition for Rehearing was timely filed and the Order denying same was filed on December 27, 1978. This Petition for a Writ of Certiorari was timely filed. The Jurisdiction of this court is involved under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Your petitioner was convicted of the offense of First Degree Murder in a jury trial conducted in Beaufort County, North Carolina. Tried along with your Petitioner were two additional co-defendants, Johnny Ray Lawrence and George Phifer.

During the course of the trial, a prosecution witness stated that all three defendants visited in her home shortly before and shortly after the crime. On the return visit, her testimony indicates that co-defendant Phifer entered her home, walking fast, and said in response to a question that they, the defendants, had robbed a bank and that "that dumb woman had picked up

a phone and screamed". Phifer did not testify in his own defense, nor did any of the co-defendants; all three were convicted.

From these facts and in this setting, the question presented for review is whether the introduction of Phifer's alleged statement violated your Petitioner's right of confrontation as articulated by this Court in the case of Bruton vs. United States 341 U.S. 123 (1969).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 6.

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Your Petitioner filed a pro se Petition seeking relief under 28 U.S.C. §2254. This Petition was denied by the Honorable John D. Larkins, Jr., United States District Judge for the Eastern District of North Carolina in an order dated October 20, 1977. In denying this Petition, the Able and Learned District Court Judge, with respect to this Sixth Amendment question, held that the statement of the Co-Defendant Phifer was admissible against your Petitioner as an implied admission, an exception to the hearsay rule, and, therefore, not violative of Bruton vs. United States.

This was the precise reasoning of the North Carolina Court in earlier upholding your Petitioner's conviction.

Relying on Fox, the Able and Learned trial Judge refused to grant a certificate of probable cause. Your Petitioner then applied to the United States Court of Appeals for the Fourth Circuit.

On December 4, 1978 the United States Court of Appeals for the Fourth Circuit entered an order denying relief, denying the certificate of Probable Cause and dismissing the appeal. Your Petitioner then filed a Petition for rehearing which was denied by the Fourth Circuit on December 27, 1978.

REASONS FOR GRANTING THE WRIT

Your Petitioner respectfully contends that his conviction should be overturned for two reasons. First, a refusal to grant the relief requested would leave State vs. Fox as the standing interpretation in North Carolina of this Court's landmark decision in Bruton vs. United States. Secondly, in rendering its decision, the Court of Appeals for the Fourth Circuit sought to justify the admission of the statement allgedly made by Co-defendant Phifer on the grounds that the jury had "a satisfactory basis for evaluating the truth of the prior statement" pursuant to Dutton vs. Evans

400 U.S. 74 and California vs. Green 399 U.S. 149 when in fact no such basis existed. Further, this method of justifying the inclusion of inadmissible evidence is bootstrapping at best and is totally incompatible with the notion that your Petitioner's constitutional rights are to be preserved at all times.

To further elaborate, the United States District Court for the Eastern District relied, in turning down your Petitioner's request for relief, upon the decision of the North Carolina Supreme Court in State vs. Fox 274 N.C. 277. For eleven years, North Carolina has relied upon the Fox decision in ruling on Bruton questions. Speaking for the majority in that case, Justice Sharp (now Chief Justice) stated as follows:

> "In joint trials of defendants it is necessary to exclude extra judicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or to the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the co-defendant (Emphasis Ours) ... and (2) that the declarant will not take the stand ... "

Clearly, North Carolina is of the belief that the Sixth Amendment and the hearsay rule are co-extensive despite the fact that this court has held, on previous

occasions that there are circumstances where the constitutional rights of an accused may be violated notwithstanding the presence of an exception to the hearsay rule Barber vs. Page 390 U.S. 719, Pointer vs. Texas 380 U.S. 400.

The previously included quote from State vs. Fox was quoted verbatim in the opinion of the North Carolina Supreme Court upholding your Petitioner's conviction. State vs. Phifer, et al. 240 N.C. 203. This case was relied upon in the denial of your Petitioner's action under §2254. It was the chief complaint of your Petitioner throughout the appeals process and yet this claim was virtually ignored by the Fourth Circuit . Clearly, if this opinion is permitted to stand, North Carolina will have succeeded in giving an exception to its hearsay rule a permanent niche in the Constitution in the form of an exception to the confrontation clause.

The second ground upon which your Petitioner bases his request for relief concerns two major areas. First: The Fourth Circuit sought to justify the inclusion of the hearsay statement by examining the other evidence at the trial and determining that the jury had a satisfactory basis for evaluating the truth of the prior statement. In your Petitioner's opinion, this procedure amounts to no more than bootstrapping, the justification

of evidence which should have been excluded from the record by pointing to other evidence in the record. It is, in one sense, the use of the fruit from the poisonous tree to determine that the fruit is not poisonous.

An analysis of the reasoning of the Circuit Court is significant here. The Court refers to the overwhelming nature of the circumstantial evidence against your Petitioner and points to the following:

1. The claim that the alleged statement was made in the presence of your Petitioner when the record will show that it is distinctly possible that this was not the case.

2. The testimony of a witness placing a car similar to your Petitioner's in the parking lot of the bank on the morning the Crime occured.

3. Testimony relating to a phone call allegedly made from the branch about 9:05.

4. Testimony from Peterson that the Defendants arrived at her home--which was twenty miles from bank at 9:20.

5. Testimony that when Wharton was arrested driving away from town, a search of his car trunk disclosed some money hidden in his trunk--it is omitted from the

Court's opinion that the serial number on the money found in the trunk of Wharton's car did not match the list of serial numbers of the money taken from the bank.

5. Corroborative testimony from a Highway Patrolman as to Peterson's statement.

It is your Petitioner's opinion that this evidence was not evaluated by the Fourth Circuit in an independent fashion. In other words, the evidence was not viewed as if Peterson's statement has been properly excluded; instead the statment itself was continually in the mind of the Court. Secondly, the Fourth Circuit overlooked an important consideration in evaluating the admissibility of Petersons' statement, i.e. its crucial place in the case built against your Petitioner. In Dutton, which is relied upon heavily by the Court of Appeals, it is noted by this Court that the statement which the Petitioner sought to exclude was only of peripheral significance in obtaining a conviction. Here the impact of the statement was devastating; the statement was highly prejudicial and your Petitioner was totally helpless to refute its impact.

As a final note, your Petitioner respectfully shows to the Court that it is well settled law in North Carolina

that implied admissions are to be received into evidence only with great caution. The entire transcript of your Petitioner's trial was more than one thousand pages in length. The portion of the record during which this statement comes into evidence covers slightly more than one page. It appears as though this damaging testimony--which, for all practical purposes, your Petitioner could not attack--was received pall-mall into evidence without any inquiry of any sort at all. The casual treatment of this statement has continued until the present. It is your Petitioner's fervent hope that this Court will see fit to review this matter.

Respectfully submitted, this the _____ day of January, 1978.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * * * * *

No. 77-8400

CHARLES WHARTON,

Appellant,

vs.

SAM GARRISON,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jur., District Judge.

Submitted: November 13, 1978 Decided: December 4, 1978

Before BUTZNER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

(James M. Ludlow, Jr., for the Appellant; Richard N. League, Assistant Attorney General, for the Appellee.)

PER CURIAM:

Charles Wharton, who was convicted by a North Carolina grand jury of first-degree murder, seeks a certificate of probable cause to appeal the district court's dismissal of his petition for habeas corpus relief. In denying Wharton's application, we find it necessary to address only his claim that the introduction of a co-defendant's out of court statement violated Wharton'w Sixth Amendment right to confrontation.

Wharton and two other men, George Phifer and Johnny Ray Lawrence, were jointly tried for murdering a bank teller while robbing the Pantego branch of the Southern Bank and Trust Company. A witness for the prosecution, Mary Peterson, testified that all three defendants visited her home shortly before and shortly after the crime allegedly occurred. On the return visit, according to her testimony, Phifer enetered her home and said in response to a question that they, the defendants, had robbed a bank and that "that dumb woman picked the phone up and screamed." Although defense counsel had earlier requested separate trials, no objection was made to Peterson's hearsay testimony. Phifer chose not to testify in his defense and all three defendants were convicted.

In his habeas corpus petition Wharton claimed that the introduction of Phifer's confession violated his right to confrontation as articulated by the Supreme Court in Bruton vs. United States, 391 U.S. 123 (1968). The district court, however, adopting the reasoning of the North Carolina Supreme Court's opinion on Wharton's direct appeal,[1] held that Phifer's statement was admissible against Wharton as an implied admission since Wharton was present when Phifer spoke, but made no denial. According to the court, an implied admission amounts to an exception to the rule in Bruton, supra.

While we agree with the district court that Wharton's right to confrontation was not violated, we do so for different reasons. The admission of a co-defendant's confession in a joint trial does not pass constitutional muster under the confrontation clause simply because the confession can be fitted into an exception to the hearsay rule under state law. A separate inquiry should be conducted to determine whether the confession bore sufficient indicia of reliability to insure that the jury had "'a satisfactory basis for evaluating the truth of the prior statement.'" Dutton vs. Evans, 400 U.S. 74, 89 (1970), quoting California vs. Green, 399 U.S. 149, 161

[1] State vs. Phifer, 225 S.E. 2d 786, 290 N.C. 203 (1970)

(1970). See United States vs. West, 574 F.2d 1131, 1137 (4th Circ. 1978); United States vs. Eaglin, 571 F. 2d 1069, 1079-82 (9th Circ. 1977).

Here we think there were ample indicia of reliability to satisfy the requirements of the confrontation clause. Not only was the statement made in the presence of Wharton, but, as in Dutton, supra, it was uttered spontaneously and against Phifer's own penal interests. Moreover, there was no evidence suggesting any reason why Phifer would not have been telling the truth. To the contrary, there was an abundance of evidence linking all three defendants to the crime. Peterson testified that the three men left her home shortly before 9:00 on the morning the crime occurred in a maroon Cadillac with New Jersey tags. Lawrence was carrying a shaving kit in which Peterson saw a pistol and a roll of white tape among other things. The testimony of another prosecution witness placed a similar car in the bank parking lot at about 9:00 a.m. Mary Tolan, employed at a different branch of the bank, testified that at approximately 9:05 a.m. an inter-bank phone connecting her branch with the Pantego branch rang, but when she picked up the receiver she heard nothing. Dorothy Cuthrell, the lone employee at the Pantego branch, was found

shortly thereafter with a bullet wound in her chest and with white tape wrapped around her ankles and face. Peterson further testified that the three defendants returned to her home at about 9:20 a.m. with Phifer carrying a bag of money. When Wharton was subsequently arrested while driving away from Pantego in the same maroon Cadillac, a search of his car trunk disclosed a stack of money hidden behind a cardboard partition.

[In short, we think it apparent that there was overwhelming circumstantial evidence corroborating the truthfulness of Phifer's admission.] Viewing the evidence in conjunction with the other indicia of reliability, we believe the district court was correct in holding that Wharton's right under the confrontation clause were not violated.[2]

With respect to the other claims asserted by Wharton, we adopt the reasoning of the district court. Wharton vs. Garrison, C/A No. 77-0101-HC (E.D.N.C.,

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[2] We note that there is no confrontation clause issue as to whether Phifer actually made the statement to Peterson since she was fully available for cross-examination on the matter. Moreover, the prosecution introduced the corroborating testimony of a state trooper, R. W. Dale, who stated that Peterson had told him of Phifer's admission on the day of the robbery. See Dutton vs. Evans, 400 U.S. 74, 88 (1970).

October 20, 1977). Accordingly, a certificate of probable cause to appeal is denied and the appeal is dismissed.

DISMISSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-8400

Charles Wharton,

Appellant,

vs.

Sam Garrison,

Appellee

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Russell, and Judge Field.

For the Court

/s/ William K. Slate, II

CLERK